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CASE NO.

in the
Supreme Court
of the
United States

JAY HILERY DeWEESE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR ISSUANCE OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

POINT I

14 U.S.C. §89(a) IS UNCONSTITUTIONAL ON ITS FACE IN THAT IT GIVES THE COAST GUARD THE ABSOLUTE RIGHT TO SEIZE AND SEARCH WITHOUT ANY PRIOR INDEPENDENT JUSTIFICATION OR WARRANT IN VIOLATION OF THE FOURTH AMENDMENT, AND 14 U.S.C. §89(a) IS UNCONSTITUTIONAL AS APPLIED IN THIS CASE.

POINT II

THE GOVERNMENT'S FAILURE TO COMPLY WITH THE TRIAL COURT'S ORDER REQUIRING DISCLOSURE OF WITNESSES DENIED PETITIONER HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND HIS SIXTH AMENDMENT RIGHT TO CROSS-EXAMINE WITNESSES.

POINT III

IN SPITE OF INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION FOR CONSPIRACY TO IMPORT MARIJUANA INTO THE UNITED STATES, THE FIFTH CIRCUIT AFFIRMED PETITIONER'S CONVICTION BY RELIEVING THE GOVERNMENT OF ITS BURDEN TO PROVE BEYOND A REASONABLE DOUBT THE ELEMENTS OF THE OFFENSE CHARGED, IN BLATANT VIOLATION OF THE FUNDAMENTAL RIGHTS TO A FAIR TRIAL AND DUE PROCESS AND THE PRESUMPTION OF INNOCENCE.

PARTIES INVOLVED

JAY HILERY DeWEESE
UNITED STATES OF AMERICA

It should be noted that originally there were four (4) other co-defendants in this case who were severed and tried separately. They were not actually parties to this action. Their names are:

JACK WAYNE FREEMAN
MOSES TAYLOR MILLIS
KEITH ALLEN KEESLING
CLIFFORD WAYNE BENNETT

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OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals (a copy of which is attached to the Appendix) is reported at 632 F.2d 1267 (5th Cir. 1980).

JURISDICTIONAL STATEMENT

On December 18, 1980, the Fifth Circuit Court of Appeals issued its opinion affirming the judgment and conviction in this cause. The court issued its mandate on March 11, 1981. On March 11, 1981, the Fifth Circuit Court of Appeals entered an order denying Petitioner's Petition for Rehearing and Suggestion for Rehearing en Banc.

This court has jurisdiction to review this case pursuant to 28 U.S.C. §1254 and Rule 17(1)(a) and (c) of the Supreme Court Rules.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth, Fifth and Sixth Amendments to the United States Constitution, 14 U.S.C. §89(a), 21 U.S.C. §846 and 21 U.S.C. §952 are involved in this Petition. The complete texts of all of these constitutional provisions and statutes are included in the Appendix to this Petition.

STATEMENT OF THE CASE AND FACTS

On June 12, 1979, an indictment was returned charging Petitioner with conspiracy to import marijuana and conspiracy to possess marijuana with intent to distribute (R 1). On June 21, 1979, Petitioner pled not guilty to the charges contained in the indictment.

On July 2, 1979, the court held an omnibus hearing. At the conclusion of this hearing, the court ordered that the parties exchange witness lists by July 20, 1979 (R 2). The court further ordered that the parties exchange the reports of experts by July 13, 1979 (R 2).

Petitioner, on July 19, 1979, filed a motion to suppress all physical evidence seized from the "Cowboy" on the contention that the warrantless search violated the Fourth Amendment of the United States Constitution (R 4). At the end of the trial, the trial court denied Petitioner's motion to suppress the physical evidence.

On August 15, 1979, jury trial began. At the end of the Government's case, Petitioner requested a judgment of acquittal. The trial court denied this motion but struck that paragraph of the indictment charging Petitioner with conspiracy to possess marijuana with intent to distribute.

The jury returned a verdict of guilty on August 16, 1979 (R 76). On September 10, 1979, Petitioner filed a motion for judgment of acquittal and a motion for a new trial (R 14, 15).

On September 21, 1979, Petitioner was adjudged guilty and sentenced to five years and a special parole term of seven years (R 18).

Petitioner, on September 21, 1979, filed this Notice of Appeal. On December 17, 1980, the Fifth Circuit Court of Appeals affirmed the trial court's ruling. Petitioner then filed his Petition for Rehearing and Suggestion for Rehearing en Banc. Both of these petitions were denied on March 31, 1981.

The "Cowboy" was boarded by the "Point Lobos" (a Coast Guard vessel) some 250 miles from the United States. The "Cowboy" was approximately 30 miles from Cuba and 39 miles from Mexico at the time it was boarded.

At the time the "Cowboy" was boarded, there were five crewmen on board including Petitioner, the Captain. The Coast Guard had boarded the "Cowboy" to check for violations of the law. Checks were made, by the boarding party, for safety equipment, documentation and comparison of the numbers on the documentation papers with the numbers on the vessel.

The numbers were found on a steel beam in the engine room about five feet above the floor. All documentation papers were in order and the safety equipment was proper. A slight problem existed which did not affect safety.

Despite the fact that the boat was properly documented and contained the necessary safety equipment, the Coast Guard decided to search the covered "hold" of the boat. This search was conducted notwithstanding the fact that there was no safety equipment in the hold and that all the documentation papers had previously been checked out.

Before searching the hold, the officer in command requested that he be allowed to search the hold of the vessel. This request was made after the officer had already informed Petitioner that they were on board to check for violations of the law. Acquiescing to what he believed to be lawful authority, Petitioner allegedly

gave the Coast Guard permission to search the hold of the boat.

Upon searching the hold of the boat, the Coast Guard discovered a large quantity of marijuana. Petitioner and the remaining crew members were immediately placed under arrest. The men were handcuffed and the "Cowboy" was towed into Tampa City Docks.

At the trial, the Commander of the Coast Guard ship, the "Dependable", testified as an expert witness as to where he believed the "Cowboy" was headed. Based on the currents, weather conditions, and the fact that there were no maps of Cuba or Mexico on board the "Cowboy", the Commander stated he believed that the "Cowboy" was headed towards America. The Commander also stated, however, that the "Cowboy" could have been headed towards Cuba.

ARGUMENT

POINT I

14 U.S.C. §89(a) IS UNCONSTITUTIONAL ON ITS FACE IN THAT IT GIVES THE COAST GUARD THE ABSOLUTE RIGHT TO SEIZE AND SEARCH WITHOUT ANY PRIOR INDEPENDENT JUSTIFICATION OR WARRANT IN VIOLATION OF THE FOURTH AMENDMENT, AND 14 U.S.C. §89(a) IS UNCONSTITUTIONAL AS APPLIED IN THIS CASE.

A. The Search

The appellate court's opinion in this case, reported as *United States v. DeWeese*, 632 F.2d 1267 (5th Cir. 1980), reflects that on May 14, 1979, some 250 miles from the United States, a three man boarding party was led by Coast Guard Petty Officer Helms onto the shrimping vessel the "Cowboy". Mr. Helms told the "Cowboy's" Captain, Petitioner DeWeese, that the purpose for the boarding was to check "for compliance with United States laws". 632 F.2d at 1269. Captain DeWeese produced the appropriate documentation papers. There were no permits for shrimping in foreign waters, a required pollution oil pollution placard was missing and one minor safety violation was revealed.

It was at this posture of events that the officer asked to look into the "Cowboy's" ice hold. It should be noted that there was no smell of marijuana. There were no bales of marijuana seen during the safety inspection and document check. The "Cowboy's" identification number had already been seen and confirmed in the engine room; it was not in the hold.[1] There was no problem with the "Cowboy's" registration. Her crew was not dressed in an unusual fashion. No one blurted out a confession that the "Cowboy" was

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[1]The main beam identification number is a number corresponding to the number of the vessel shown on the documentation papers, and generally is carved into the main beam of a vessel. *United States v. Odom*, 526 F.2d 339, 341 (5th Cir. 1976). In *Odom*, in order to observe the main beam identification number on the "Mar-J-May", it was necessary to open the hatch into the hold. On the "Cowboy", the identification number was in the engine room. Accordingly, there was no reason to open the covered hold.

"full of marijuana" or on a "pot run". Captain DeWeese and the crew members were not acting in a suspicious manner, nor were they evasive. Rather, they cooperated with the officers.

This case represents the pure power to search under the provision of §89(a) rather than a reason for searching as in each of the other reported cases.

B. The Fifth Circuit's Ruling

Notwithstanding the absence from the record of such links in the chain of circumstances as would establish probable cause to look in the hold, the Fifth Circuit Court of Appeals found that the search of the ice hold did not violate the Fourth Amendment to the United States Constitution because the hold was not an area of a vessel in which the captain would have a legitimate expectation of privacy. 632 F.2d 1270-71. Then, as if to resort to "any port in a storm" to uphold the trial court's refusal to suppress the marijuana found when the hold was searched, the Fifth Circuit, in a footnote, provided two alternative theories for affirmance. First, the "Cowboy's" location coupled with the apparent lack of fishing activity created a "reasonable suspicion" that she was on a narcotics run. Second, when asked whether the officer could look in the hold, Captain DeWeese responded, "Sure, but you're not going to like what you find." The court considered this to be a voluntary consent to search. However, because "reasonable suspicion" and consent go to the reasonableness of the search, the Fifth Circuit elected not to deal with that issue because it had already ruled that the search did not infringe on any interest of

DeWeese which the Fourth Amendment was designed to protect. 632 F.2d at 1271, footnote 1.

C. Points for Review on Certiorari

The Petitioner would suggest, and in fact will show, that the search of the "Cowboy's" ice hold was illegal and unconstitutional (1) because the record fails to show that Captain DeWeese did *not* have a legitimate expectation of privacy in the ice hold; (2) there was no probable cause to search the ice hold following the completion of the routine document and safety inspection of the "Cowboy", nor was there "reasonable suspicion", and (3) there was no voluntary consent to the search. At best, Captain DeWeese's statement was mere acquiescence to a claim of lawful authority.

The Coast Guard boarding of the "Cowboy" was conducted pursuant to the authority of 14 U.S.C. §89(a), the text of which is set out in the Appendix to this Petition.

To date, the vast majority of the cases involving Section 89(a) searches have come out of the Fifth Circuit. Without exception, the opinions in the Fifth Circuit cases, as well as those of other Circuits, either affirm convictions based upon evidence obtained as the result of a Section 89(a) search, or reverse a trial court's order granting a motion to suppress such evidence. See cases in part "F", *infra*.

In spite of the substantial number of circuit court cases on point, the virtual plenary power of the Coast Guard to stop and search all vessels subject to the

jurisdiction of the United States has never been examined by this in terms of its Fourth Amendment implications. The Petitioner would suggest that the issue is ripe for review, and that this case is the appropriate vehicle for that review.

D. A Captain May Have a Legitimate Expectation of Privacy in the Concealed Covered Hold of a Ship

In this case, the Fifth Circuit went beyond mere consideration of the propriety of the §89(a) search of the "Cowboy". It made a blanket ruling that the captain of a vessel has no right to object to a warrantless search of the hold of the vessel because he has no legitimate expectation of privacy in the hold. This ruling is unreasonably broad and incorrect as applied to the instant case.

It has long been held that legitimate expectations of privacy "must have a source outside of the Fourth Amendment, either by reference to the concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas v. Illinois*, 439 U.S. 128 at 143, n.12, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). The legitimate expectation of privacy rationale became "cemented" in its position as the sole determinant of one's capacity to contest a search and seizure in *Rawlings v. Kentucky*, ___ U.S. ___, 100 S.Ct. 2556, 64 L.Ed.2d ___ (1980).[2] *Rakas* and *Rawlings* suggest

[2]See, Slobogin, Capacity to Contest a Search and Seizure: the Passing of Old Rules and Some Suggestions for New Ones, 18 American Criminal Law Review, 387 at 395 (1981).

at least four indicia of privacy for courts to consider: the individual's authority to exclude others from the searched area; his previous access to and use of the area; his attempts to maintain privacy; and his subjective expection of privacy.[3] These are factors which have to be applied and analyzed on a case by case basis.

In *United States v. Williams*, 617 F.2d 1063 (5th Cir. 1980), the court, sitting en banc, agreed that a mere crew member could have no interest in the hold of a cargo vessel. 617 F.2d at 1084. The court then recognized that under *Rakas v. Illinois, supra*, which was decided after William's conviction, the owner of a vessel or its cargo may have some privacy interest in the hold. The court declined to remand the case to the trial court for an evidentiary hearing into William's possible ownership of the vessel or the cargo, however, due to the "reasonable suspicion" arising from the surrounding circumstances.[4]

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[4]Those circumstances included the observation by a DEA pilot on a flying mission, of the subject cargo vessel anchored off the coast of Colombia, being met by several small boats; the observation of the same vessel by a Coast Guard Cutter five days later in international waters flying a distress signal flag but refusing an offer of Coast Guard assistance; two days later, the crew members were on deck waving clothes, toilet paper and flashlights for several hours, the cargo ship stopped dead in the water and one crewman dove overboard and swam to the Coast Guard Cutter reporting that there was "dirty business" on board. 617 F.2d 1070. "Reasonable suspicion" is moot in the *Williams* case because from all of the facts, certainly probable cause existed for the search.

[3]Id. at 400.

The *Williams* case fails to reach the question of whether a captain has a legitimate expectation of privacy in the hold of a ship, focusing only on the owner of the vessel or the cargo. The fallacy in the reasoning in *Williams, supra,* is that it assumes that every ship's identification number is found in the hold and that anyone conducting an administrative search would have to go into the hold to check the number. 617 F.2d at 1086. The court did recognize that even if an administrative inspection required entry into the hold, search of the hold should not be unrestricted because:

> . . . there may be areas in the holds of vessels where someone could have a legitimate privacy interest. A Section 89(a) search of those "private" areas of the hold . . . for the purpose of finding contraband or other evidence of criminal activity, when there is no reason to suspect that the items being sought will be found there, is today unreasonably intrusive.

617 F.2d at 1086.

As the facts in the instant case show, the "Cowboy's" identification numbers were on the main beam in the engine room. There was no need for any intrusion to be made into the hold. Nonetheless, the Fifth Circuit upheld the search on grounds that there was no legitimate expectation of privacy therein. We agree with the court that:

> There can be no legitimate expectation of privacy in those areas of a commercial vessel which are subject to the common access of those legitimately aboard the vessel.

632 F.2d 1271.

On this record, however, we cannot agree with the court that although Captain DeWeese may have had a legitimate expectation of privacy in a foot locker or in his private cabin,

> The ice hold in to which each would be expected to go (or at least to peer) was not such an area.

632 F.2d 1271.

This blanket assertion fails to take into consideration the position of the captain as master of the ship and its crew. The statement that "each would be expected to go (or at least peer)" into the hold has no basis in the record. Consider the following possibilities: The closed, covered hold is kept locked and the captain has the only key; the captain has given specific instructions that no one is to open, peer or go into the hold; the captain is the owner or part-owner of the ship or its cargo; the ship is transporting dangerous cargo in the hold, such as wild animals, poisonous gas or explosives. Under certain circumstances, the hold of a ship could be analogous to the trunk of a car, the rear portion of a semi-tractor trailer truck or a locked safe.

It is respectfully submitted that the opinion of the appellate court should be quashed, at least to the extent that it holds that the captain of a ship has no legitimate expectation of privacy in the hold so as to contest a search of the hold. The matter should be remanded to the trial court for a full evidentiary hearing on the motion to suppress to establish the existence vel non of

Rakas and *Rawlings* indicia of privacy which Captain DeWeese has with respect to the "Cowboy's" hold.

E. Discretionary, Random Administrative Vessel Safety Searches at Sea Under Section 89(a) Are Unconstitutional

While the Government surely has a legitimate interest in promoting safety at sea, the intrusion upon Fourth Amendment interests entailed by a vessel inspection is significant in that it interferes with individuals right of free movement and is closely analogous to the investigatory stops of individuals and automobiles recognized as constituting seizures of the person.[5]

An important indication that there should be some viable Fourth Amendment limitations upon Section 89(a) searches is found in *United States v. Piner*, 608 F.2d 358 (9th Cir. 1979). The Ninth Circuit held that just as an automobile stop creates a subjective intrusion requiring the use of less intrusive alternatives,

> . . . surely the stop of an isolated boat after dark, followed by a physical intrusion upon the boat itself, would have an unsettling effect immeasureably greater, placing a far greater demand upon the government to come forward with balancing factors.

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[5]High on the Seas: Drug Smuggling, the Fourth Amendment and Warrantless Searches at Sea, 93 Harvard L. Rev. 725, 742 (1980).

* * *

> We conclude that the random stop and boarding of a vessel after dark for safety and registration inspection without cause to suspect noncompliance is not justified by the governmental need to enforce compliance with safety regulations and constitutes a violation of the Fourth Amendment.

608 F.2d 358.

Random, warrantless Coast Guard stops cannot be justified under the administrative inspection exception to the search warrant requirement in light of *Marshall v. Barlow's Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978). Under Fifth Circuit case law, the only limit on the Coast Guard's authority to search vessels lawfully boarded is that it may not search "private" areas for the purpose of finding evidence of criminal activity without reason to suspect the existence there of such evidence. *United States v. Williams*, 617 F.2d 1063, 1075 (5th Cir. 1980); *United States v. Robbins*, 623 F.2d 418, 420 (5th Cir. 1980). Vessel safety inspections involve boarding and comprehensive searches which create significant intrusions upon the individual's distinct privacy interest.[6]

Either legislative or judicial rules should be adopted for safety inspections of vessels so as to ensure that this abuse of discretion is minimized. For example, a mandatory dockside inspection program similar to state

[6] Id. 743

automobile inspection programs; random dockside inspections with prior notice to owners of vessels; or unscheduled inspections at sea only when owners consent or when there is some factual basis for believing a safety violation will be discovered on board the vessel.[7]

> In *Delaware v. Prouse*, the Supreme Court required only a reasonable suspicion of a violation for the limited investigatory stop of automobiles. Since vessel inspections involve a greater degree of intrusion, it would be appropriate for courts to require that any inspection at sea be based upon probable cause to believe a specific safety deficiency exists and be limited to that intrusion necessary to verify the existence of the safety deficiency.[8]

F. The Search of the "Cowboy" Was Not Based Upon Probable Cause

In all of the Section 89(a) search cases, the appellate courts have been able to point to probable cause to uphold the search.[9] In many cases, the boarding was precipitated by suspicious activities by the crew, or the lack of a flag or outward vessel identification, and once on board, the Coast Guard officers either observed contraband in plain view or smelled it, or someone on

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[7]id. 743, 744, 745

[8]id. 745

[9]In *United States v. Williams, supra*, the Fifth Circuit reduced the standard from probable cause to reasonable suspicion. The evidence in this case does not even rise to the level of reasonable suspicion.

board confessed. This case is different. The government failed to demonstrate probable cause at trial, and the appellate court did not attempt to find probable cause. The record reflects a wholesale warrantless search of a vessel, including the concealed covered hold, under the pretext of a document and safety search, without probable cause and without voluntary consent.[10]

As a general rule, the Circuits hold that the Coast Guard has authority to stop and board an American vessel without probable cause to conduct a document and safety inspection. The courts uphold complete searches of vessels when, during the course of such inspections, circumstances arise that generate probable cause to believe that a violation of United States law has occurred. Once probable cause is found, the Coast Guard may conduct searches, seize evidence and make arrests. *United States v. Warren*, 578 F.2d 1058, 1065 (5th Cir. 1978) (en banc). See, *United States v. Hilton*, 619 F.2d 127 (1st Cir. 1980); *United States v. Demanett*, 629 F.2d 862 (3rd Cir. 1980); *United States v. Harper*, 617 F.2d 35 (4th Cir. 1980); *United States v. Rubies*, 612 F.2d 397 (9th Cir. 1979); *United States v. Odom*, 526 F.2d 339 (5th Cir. 1976); *United States v. Warren*, *supra*; *United States v. Robbins*, *supra*; *United States v. Hicks*, 624 F.2d 32 (5th Cir. 1980); *United States v. Shelnut*, 625 F.2d 59 (5th Cir. 1980).

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[10]From the Fifth Circuit's opinion, it is undisputed that the "Cowboy's" captain and crew cooperated with the Coast Guard in the document and safety check. The vessel documentation numbers were confirmed by observation of the main beam in the engine room.

The instant case fails to present any circumstances to justify any further search after a routine document and safety check had been completed.

G. There Was No Voluntary Consent

In order for a defendant to give a valid consent to search, that consent must be freely and voluntarily given. In the leading United States Supreme Court case of *Schnechloth v. Bustamonte*, 412 U.S. 418, 93 S.Ct. 2041, 36 L.Ed.2d 354 (1973), the court stated:

> But the Fourth and Fourteenth Amendments require that a consent not be coerced by explicit or implicit means, by implied threat or covert force. For no matter how subtly the coercion was applied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.

The court went on to state:

> In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken to subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents.

In this case, any consent that may have been given by the captain would only have been an acquiescence to a claim of lawful authority.

See also, *Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968), in which this Court held:

> When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was in fact freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority.

In the instant case, rather than claim authority to search based on a search warrant, the commander claimed authority to search for any violations of United States laws. By doing this, the commander in effect told the captain that he had no right to refuse the search. Therefore, it cannot be held that there was a consent to the search in this case.

If the captain of the vessel refused consent, he would in effect be declaring §89(a) unconstitutional since the absolute right to search exists under that provision of the United States Code.

POINT II

THE GOVERNMENT'S FAILURE TO COMPLY WITH THE TRIAL COURT'S ORDER REQUIRING DISCLOSURE OF WITNESSES DENIED PETITIONER HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND HIS SIXTH AMENDMENT RIGHT TO CROSS-EXAMINE WITNESSES.

A. The Right to Counsel and the Right to Cross-examine Witnesses

Under the Sixth Amendment, a defendant has the right to the assistance of counsel and the right to cross-examine witnesses. The importance of the effective assistance of counsel to the functioning of the adversary system has long been recognized by this Court. In *Gideon v. Wainwright*, 371 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), Mr. Justice Black, speaking for the majority of the Court, emphasized the importance of counsel in our adversary system:

> The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

This Court has also recognized that in order for one to receive the effective assistance of counsel, counsel must have the opportunity to conduct a meaningful cross-examination. In *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), this Court held:

> It cannot seriously be doubted at this late date that the right of cross-examination is

> included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case.

The court went on to state:

> There are few subjects perhaps upon which this court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.

B. The Government Violated the Court's Omnibus Order Requiring Both the Government and the Defense to Exchange Witness Lists by July 20, 1979

On July 2, 1979, the trial court conducted an omnibus hearing at which time the prosecution and the defense agreed that they would exchange witness lists prior to trial. The court entered an order requiring that the witness lists be exchanged by July 20, 1979 (some 25 days before trial). On July 19, 1979, in response to that order, the Government supplied Petitioner with a list of the witnesses it intended to call at trial. On July 31st, an additional witness list was submitted by the Government. Unbeknownst to the defense, the Government had omitted the name of its key witness from those lists.

It was not until the case was called for trial on August 14, 1979, that the Government informed Petitioner that it intended to call Commander Howard Gehring to testify on behalf of the prosecution, in spite of the fact that his name was not included in the witness lists required by court order to be submitted from the Government to Petitioner.

The importance of the Gehring testimony cannot be over-emphasized. Commander Gehring was the officer in charge of the Coast Guard Cutter "Dependable". The "Dependable" was the Coast Guard ship from which the "Point Lobos" received the authorization to stop and board the "Cowboy" in order to conduct a search and seizure, under pretext of a check for violations of United States laws.

C. Gehring was the Key Government Witness on the Issue of Conspiracy to Import into the United States

The Government's flagrant abuse of the trial judge's order to provide the defense with a complete witness list is a serious violation of the prosecutorial obligation to ensure that the defendant receives a fair trial. The situation is exacerbated by the fact that the witness withheld from the list happened to be its most essential trial witness.

One of the main issues at trial was whether Petitioner had entered into a conspiracy to import marijuana into the United States. It was the Government's burden to prove that Petitioner was in fact coming to the United States rather than going to Cuba or Mexico. It was through Commander Gehring's testimony that the

Government tried to establish that the "Cowboy" was coming into the United States.

D. Gehring was Permitted to Testify as an Expert in Navigation and Oceanography.

Commander Gehring was allowed to testify as an expert on matters relating to how wind currents, ocean currents and weather conditions would affect the final destination of a vessel. Absent notice that such evidence was going to be used by the Government, Petitioner was denied the benefit of such preparation as would consititute effective representation by his attorney.

By concealing its expert witness until the day of trial, the Government effectively prevented defense counsel from conducting a competent or adequate cross-examination of Commander Gehring. It would be impossible to expect an attorney on a half day's notice to become an expert on wind currents, ocean currents and weather conditions. If the Government had timely revealed that Commander Gehring was going to testify, defense counsel would have had the opportunity to adequately prepare a cross-examination, and engage the services of its own experts concerning the probable ultimate destination of the "Cowboy".

E. The Fifth Circuit's Ruling

The Fifth Circuit's ruling with respect to the Government's violation of the court's omnibus order is found at 632 F.2d, page 1273:

> We can find *no excuse* for the Government's failing to inform the Appellant in a timely fashion that Caption [sic] Gehring would testify. Certainly his testimony is a *crucial part of the Government's case.* We agree that it is *inconceivable* that the Government learned of the Commander one day before trial.
>
> * * *
>
> . . . we strongly condemn the failure of the Government to abide by its obligations under the omnibus proceeding . . . (Emphasis added)

In spite of the Government's improper conduct, the court failed to reverse the conviction, because it determined that Petitioner failed to make a showing of prejudice. As authority, the Fifth Circuit cited *United States v. Phillips*, 585 F.2d 745, 747 (5th Cir. 1978). Review of the *Phillips* opinion reveals that it is distinguishable from the instant case.

The prejudice visited upon the Petitioner is obvious. The discovery order was a fair procedure and its violation by the Government resulted in patent unfairness. See, *United States v. Roybal*, 566 F.2d 1109 (9th Cir. 1977), citing *McNabb v. United States*, 318 U.S. 332, 347, 63 S.Ct. 608, 616, 87 L.Ed. 819 (1943).

POINT III

IN SPITE OF INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION FOR CONSPIRACY TO IMPORT MARIJUANA INTO THE UNITED STATES, THE FIFTH CIRCUIT AFFIRMED PETITIONER'S CONVICTION BY RELIEVING THE GOVERNMENT OF ITS BURDEN TO PROVE BEYOND A REASONABLE DOUBT THE ELEMENTS OF THE OFFENSE CHARGED, IN BLATANT VIOLATION OF THE FUNDAMENTAL RIGHTS TO A FAIR TRIAL AND DUE PROCESS AND THE PRESUMPTION OF INNOCENCE.

A. At Trial, the Government Failed to Prove the Elements of the Charge of Conspiracy To Import into the United States

It is elemental in the American system of justice that in order to convict a defendant, the Government has the burden of proving every element of the offense charged beyond a reasonable doubt. See, *United States v. Salinas-Salinas*, 555 F.2d 470 (5th Cir. 1977). This Court expressed its concern with the vital importance of the reasonable doubt standard in *In re: Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970):

> The requirement of proof beyond a reasonable doubt has this vital role on our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest of immense importance, both because

> of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is a reasonable doubt about his guilt.

The two elements which the Government had to prove in this case were first, that the Petitioner made an agreement with someone to import marijuana, and second, that Petitioner intended to import it into the United States. See, *United States v. Bright*, 550 F.2d 240 (5th Cir. 1977). But the evidence at trial fell far short of establishing those facts.

The record reflects that the "Cowboy" was stopped by the Coast Guard ship "Point Lobos", approximately 250 miles from the United States, at a point only 30 miles from Cuba and only 39 miles from Mexico. The Government tried to prove that the "Cowboy" was definitely coming to the United States, relying solely on circumstantial evidence from Commander Gehring.[11] Gehring testified that the "Cowboy" was not taking advantage of currents which would take her east or west, but instead was taking advantage of the current that took her north. This fact, coupled with the fact that the "Cowboy" had no maps on board that would enable her to land elsewhere, was the evidence that led

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[11]As demonstrated in Point II, *supra*, the Government's case depended entirely upon the "tainted" testimony of Commander Gehring who was permitted to testify as an expert, in spite of the Government's noncompliance with the court's omnibus order.

Gehring to the conclusion that the "Cowboy" was headed toward the United States. These were the only facts adduced at trial relating to whether Petitioner intended to import the marijuana into the United States.

B. The Fifth Circuit's Holding

The Fifth Circuit excused the Government from its burden of proof beyond a reasonable doubt and in its place, created a double presumption that (1) there was a conspiracy and (2) the conspiracy was for importation into the United States. *DeWeese, supra*, 632 F.2d at 1272. The other reasonable hypotheses that the "Cowboy" was headed for Mexico or Cuba, for example, were negated by the existence of the double presumption.

As authority for its position, the Fifth Circuit relied on its previous decision in *United States v. Alfrey*, 620 F.2d 551 (5th Cir. 1980) which established a presumption that the three persons on board a vessel had *knowledge* of the presence of marijuana from the probable length of the voyage and the quantity of marijuana on board. But the *DeWeese* panel expanded the *Alfrey* presumption way beyond any constitutional parameters when it stated that it was illogical to assume that an individual would attempt to smuggle a large amount of marijuana ". . . to the United States without pre-arranged assistance." 632 F.2d 1272. These new presumptions of (1) "pre-arranged assistance" to smuggle (2) into the United States, eliminated the Government's burden of proof and shifted the burden onto the Petitioner to prove himself innocent beyond a reasonable doubt. The presumption is now one of guilt. The foundation of the criminal procedure system has thus been turned on its head.

CONCLUSION

Based on the foregoing, it is respectfully urged that the writ of certiorari issue in this case.

Respectfully submitted,

Law Offices of
MILTON E. GRUSMARK, P.A.

By: _____
MILTON E. GRUSMARK

By: _____
SHERYL J. LOWENTHAL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the United States Solicitor General, Department of Justice, Washington, D.C. 20530; and to Stephen S. Cowen, Esquire, Assistant United States Attorney, 500 Zack Street, Room 410, Tampa, Florida 33601; on this _____ day of May, 1981.

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By: _____
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Appendix

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES of America,
Plaintiff-Appellee,

v.

Jay Hilery DeWEESE,
Defendant-Appellant.

No. 79-5575.

United States Court of Appeals,
Fifth Circuit.

Dec. 17, 1980.

Defendant was convicted in the United States District Court for the Middle District of Florida, Wm. Terrell Hodges, J., of conspiracy to import marijuana, and defendant appealed. The Court of Appeals, James C. Hill, Circuit Judge, held that: (1) ice hold of shrimp boat was not area in which captain of the boat could have had legitimate expectation of privacy, and thus search of the ice hold did not infringe interests which Fourth Amendment was designed to protect; (2) district court was not deprived of jurisdiction over prosecution for conspiracy to import narcotics on alleged basis that there was no evidence establishing that either agreement to conspire or overt act in furtherance of conspiracy was committed within United States; (3) evidence was sufficient to establish that defendant, who was apprehended in shrimp boat on high seas, intended to import marijuana into United States, and (4) absent showing of prejudice, defendant was not entitled to reversal of conviction due to claimed violation by Government of its discovery obligations in failing to

inform defendant until day before trial that specific expert witness would be testifying.

Affirmed.

1. Searches and Seizures —7(10,20)

Plenary authority, under statute of Coast Guard to stop and board American vessels on high seas to inspect for safety, documentation, and obvious customs and narcotics violations was reasonable within meaning of Fourth Amendment. 14 U.S.C.A. §89(a); U.S.C.A.Const. Amend. 4.

2. Searches and Seizures —7(10)

For purposes of Fourth Amendment, one may have protected expectation of privacy in absence of property interest; on other hand, one may have fee simple title to property upon which one has no expectation of privacy. U.S.C.A.Const. Amend. 4.

3. Searches and Seizures —7(10)

Ice hold of shrimp boat was not area in which captain of the boat could have had legitimate expectation of privacy, and thus search of the ice hold did not infringe interests which Fourth Amendment was designed to protect. U.S.C.A.Const. Amend. 4.

4. Drugs and Narcotics —182

Coast Guard had reasonable suspicion to search ice hold of shrimp boat for narcotics violation where

boarding party could have concluded, based on their experience, that location of the shrimp boat coupled with total absence of fishing activity created "reasonable suspicion" that the boat was on narcotics run. U.S.C.A.Const. Amend. 4.

5. Searches and Seizures —7(28)

Under circumstances as whole, response by captain of shrimp boat to Coast Guard officer's request to look in ice hold of the boat, "Sure, but you're not going to like what you find," constituted voluntary consent to search of the ice hold. U.S.C.A.Const. Amend. 4.

6. Criminal Law —97(3)

District court was not deprived of jurisdiction over prosecution for conspiracy to import narcotics on alleged basis that there was no evidence establishing that either agreement to conspire or overt act in furtherance of conspiracy was committed within United States where defendants, who were apprehended on high seas, were shown to have intended the conspiracy to be consummated within territorial boundaries of the United States. U.S.C.A.Const. Amend. 4; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 1002(a), 1013, 21 U.S.C.A. §§ 952(a), 963.

7. Drugs and Narcotics —124

Evidence was sufficient to establish that defendant, who was apprehended in shrimp boat on high seas, intended to import marijuana into United States. U.S.C.A.Const. Amend. 4; Comprehensive Drug Abuse

Prevention and Control Act of 1970, §§ 1002(a), 1013, 21 U.S.C.A. §§ 952(a), 963.

8. Conspiracy —47(12)

Evidence was sufficient to find that shrimp boat captain, who was apprehended on high seas, was engaged in conspiracy to import marijuana. U.S.C.A.Const. Amend. 4; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 1002(a), 1013, 21 U.S.C.A. §§ 952(a), 963.

9. Criminal Law —1166(1)

Absent showing of prejudice, defendant was not entitled to reversal of conviction for conspiring to import marijuana on basis that government failed to provide chart depicting ocean currents in Gulf of Mexico, which chart defendant alleged was "report" within meaning of rule governing discovery. Fed.Rules Cr.Proc. Rule 16(a)(1)(D), 18 U.S.C.A.

10. Criminal Law —1166(11)

Absent showing of prejudice, defendant was not entitled to reversal of conviction due to claimed violation by Government of its discovery obligations in failing to inform defendant until day before trial that specific expert witness would be testifying. Fed.Rules Cr.Proc. Rule 16(a)(1)(D), 18 U.S.C.A.

Milton E. Grusmark, Miami, Fla., for defendant-appellant.

Stephen S. Cowen, Asst. U.S. Atty., Tampa, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before RONEY, HILL and FAY, Circuit Judges.

JAMES C. HILL, Circuit Judge:

At dawn on May 14, 1979 the "Cowboy," a large shrimping vessel, was stopped by a Coast Guard cutter in the Straits of Yucatan. Approximately 41,000 pounds of marijuana were discovered in the vessel's ice hold. This case is an appeal by the captain of the "Cowboy," Jay Hilery DeWeese, from a jury conviction for conspiracy to import marijuana into the United States. 21 U.S.C. §§ 952(a) and 963.

DeWeese's arguments fall into four categories. First, he contends that violations of the fourth amendment require that the marijuana be suppressed. Second, he argues that the district court lacks jurisdiction when the evidence fails to show that either the agreement to conspire or an overt act in furtherance thereof is committed in the United States. Third, he asserts that the evidence is insufficient to establish that he intended to import marijuana into the United States. Fourth, he maintains that the government violated Fed.R.Crim.P. 16 and the omnibus order in this case by failing to identify a witness, and provide a copy of the chart prepared by that witness, in a timely fashion. For the reasons set out below, we affirm.

I. *Encounter in The Yucatan Straits*

On the morning of May 14, 1979 the Coast Guard cutter "Point Lobos" was on patrol near the Straits of Yucatan some 250 miles from the United States. It observed an unidentified vessel on its radar approximately nine miles away. Upon closer investigation the vessel was identified as a large shrimp boat with the name "Cowboy" and the home port of "Mobile" painted on her stern.

When first sighted, the "Cowboy" was on a heading of 290 to 300 degrees, or northwest, at nine knots per hour. As the "Point Lobos" closed to within three miles, the "Cowboy" changed course to a heading of 340 degrees, or north-northwest. At a distance of approximately twenty-five yards the "Point Lobos" requested over its loudspeaker that the "Cowboy" stop for a boarding.

Petty Officer Helms led a three man boarding party onto the "Cowboy." The appellant identified himself as the captain. Mr.Helms told him that he was checking the "Cowboy" for compliance with United States laws. Record, Vol. IV, at B-12-13.

In response to Mr. Helms request DeWeese produced documentation papers which identified the "Cowboy" as an American flagship. No permits were produced which would allow the "Cowboy" to shrimp in foreign waters. An inspection of the vessel revealed one minor safety violation and the absence of a required oil pollution placard.

During the inspection both Mr. Helms and Coast Guardsman Gayle observed that the vessel was extremely

clean. The rigging for the shrimp nets appeared unused. In addition, the metal strips on the boards used for dragging the nets on the ocean floor were rusty. This suggested the boards had not been used recently as the metal strips would have been shiny from contact with the ocean floor.

After inspecting the "Cowboy's" engine room, Mr. Helms asked DeWeese if he could look in the vessel's ice hold where the catch is generally stored. DeWeese responded, "Sure, but you're not going to like what you find." (Record, Vol. IV, at B-17). DeWeese and another crewmember proceeded to lift the hatch to the ice hold. A large number of marijuana bales could be seen from the deck. DeWeese and his four crewmembers were placed under arrest. Five-hundred and three bales of marijuana weighing over 41,000 pounds with a value of approximately $8,000,000 were seized.

DeWeese and the four crewmembers were indicted for conspiracy with each other and others unknown for a twofold purpose: importation and possession with intent to distribute. The trial of the crewmembers was severed. The charge of conspiracy to possess with intent to distribute was struck from the indictment. DeWeese was convicted by a jury on the charge of conspiracy to import. He appeals.

II. *Search and Seizure on the High Seas*

[1] Appellant first argues that 14 U.S.C. § 89(a) is unconstitutional because it allows the Coast Guard to stop and board a vessel on the high seas without probable cause or reasonable suspicion. The fourth amendment

prohibits only those searches and seizures that are unreasonable. This Circuit has found the Coast Guard's §89(a) plenary authority to stop and board American vessels on the high seas to inspect for safety, documentation, and obvious customs and narcotics violations to be reasonable within the meaning of the fourth amendment. *United States v. Williams*, 617 F.2d 1063, 1075-78 (5th Cir. 1980) (en banc); *United States v. Erwin*, 602 F.2d 1183, 84 (5th Cir. 1979) (per curiam); *United States v. Warren*, 578 F.2d 1058, 1064-65 (5th Cir. 1978) (en banc). Such searches may be conducted "in the complete absence of suspicion of criminal activity." *Williams* at 1075.

Appellant's next contention leads us into less certain waters. Appellant asserts that even if we assume the Coast Guard correctly stopped and boarded the "Cowboy," Helms subsequent search of the ice hold was conducted without probable cause and is therefore violative of the fourth amendment.

Our inquiry properly begins with a determination of whether the disputed search has infringed an interest of the appellant which the fourth amendment was designed to protect. *Rakas v. Illinois*, 439 U.S. 128, 140, 99 S.Ct. 421, 428, 58 L.Ed.2d 387 (1978). Specifically, we must decide whether or not DeWeese has a "legitimate expectation of privacy" in the ice hold of a large shrimping vessel. *See Rawlings v. Kentucky*, _____ U.S. _____, 100 S.Ct. 2256, 2261, 65 L.Ed.2d 633 (1980).

Our most recent en banc encounter with search and seizure at sea embraces this initial inquiry required by *Rakas*. *United States v. Williams*, 617 F.2d 1063 (5th Cir. 1980) (en banc). In *Williams*, we held:

> We have concluded that "reasonable suspicion" is the appropriate fourth amendment standard by which to judge section 89(a) searches of the "private" areas — if there can be such areas — of the holds of vessels in international waters conducted for the purpose of discovering contraband or evidence of criminal activity.

617 F.2d at 1088.

In *Williams* we assumed that the defendant had a reasonable expectation of privacy in the hold, thereby avoiding the issue of what is necessary to constitute a privacy interest in the hold of a merchant vessel. *Id.*, at 1084-85. We cannot, and should not, avoid that issue here.

[2] It has been established that the fourth amendment's protection is not to be measured exclusively by the laws defining property rights, trespass, and the like. *Rawlings v. Kentucky*, _____ U.S. _____, 100 S.Ct. 2556, 2562, 65 L.Ed.2d 633 (1980); *Rakas v. Illinois*, 439 U.S., at 149-150, n.17, 99 S.Ct, at 434 n.17 (1978). One may have a protected expectation of privacy in the absence of property interest. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Rios v. United States*, 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed.2d 1688 (1960). On the other hand, one may have fee simple title to property upon which he has no expectation of privacy. *Lewis v. United States*, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966). *See Hester v. United States*, 265 U.S. 57, 59, 44 S.Ct. 445, 446, 68 L.Ed. 898 (1924). For example, the owner of a mercantile establishment gives up any legitimate expectation of privacy as to goods and wares in his glass enclosed shop window.

Upon and within enclosed real or other property, expectation of privacy may vary from area to area. The outer walls of a single family residence will usually be coextensive with privacy therein. In a condominium building, all legitimately inside the building have free access to the common areas; an owner's expectation of privacy, vis-a-vis others properly inside, would normally be limited to the owner's private living quarters.

Within a property where some of the enclosed area is private to the individual and the rest freely accessible, there may yet remain an expectation of privacy as to persons not entitled to be upon the property at all. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 314-15, 98 S.Ct. 1816, 1821-22, 56 L.Ed.2d 305 (1978). Nevertheless, in an area to which access is freely given to all properly and lawfully within the close, it is apparent that, as to them, a reasonable expectation of privacy does not exist in the common area. *Cf. United States v. Dionisio*, 410 U.S. 1, 13-16, 93 S.Ct. 764, 771, 35 L.Ed.2d 67 (1973) (the fourth amendment does not protect what "a person knowingly exposes to the public, even in his own home or office . . . .")

[3-5] Of those legitimately aboard the "Cowboy" on the morning of May 14, 1979 was Petty Officer Helms. 14 U.S.C. § 89(a). *United States v. Williams*, 617 F.2d 1063, 1075-78 (5th Cir. 1980) (en banc); *United States v. Erwin*, 602 F.2d 1183, 1184 (5th Cir. 1979) (per curiam); *United States v. Warren*, 578 F.2d 1058, 1064-65 (5th Cir. 1978) (en banc). Though not pertinent to our task today, there may well have been enclosures to which Captain DeWeese and other individuals lawfully aboard retained a legitimate expectation of privacy. A crewmember's foot locker, duffle bag, private cabin or

quarters may well have been accessible to only that one individual and not others. The ice hold into which each would be expected to go (or, at least, to peer) was not such an area.[1] There can be no legitimate expectation of privacy in those areas of a commercial vessel which are subject to the common access of those legitimately aboard the vessel. *Cf. Coolidge v. New Hampshire*, 403 U.S. 443, 466-468, 91 S.Ct. 2022, 2038-2039, 29 L.Ed.2d 564 (1971).

III. *Extraterritorial Jurisdiction and Sufficiency of the Evidence*

[6] Appellant also alleges that the district court lacked jurisdiction over this case because there was no

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[1]Two alternative grounds for upholding the district court's refusal to suppress the marijuana exist. First, we find that the Coast Guard had reasonable suspicion to search the hold for a narcotics violation. Based on their experience, the boarding party could have concluded that the location of the "Cowboy" coupled with the total absence of fishing activity created a "reasonable suspicion" that the "Cowboy" was on a narcotics run. Second, when Mr. Helms asked DeWeese if he could look in the ice hold DeWeese responded, "Sure, but you're not going to like what you find." Considering the circumstances as a whole we find that DeWeese's response constitutes voluntary consent to search. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973). However, these two grounds concern the "reasonableness" of the search. *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) mandates that we begin our analysis with the inquiry of whether or not the search infringes on any interest of the defendant which the fourth amendment was designed to protect. As we have concluded that the search in question did not so infringe upon DeWeese, it is unnecessary to reach the "reasonableness" of the search.

evidence to establish that either the agreement to conspire or an overt act in furtherance of the conspiracy was committed within the United States. This issue has been decided adversely to the appellant. *United States v. Ricardo*, 619 F.2d 1124 (5th Cir. 1980). As regards 21 U.S.C. § 963, *Ricardo* held that "[t]he fact that appellants intended the conspiracy to be consummated within the territorial boundaries satisfies jurisdiction requisites." *Id.*, at 1129. *See United States v. Perez-Herrera*, 610 F.2d 289 (5th Cir. 1980) (Congress intended the crime of attempting to import a controlled substance into the United States, 21 U.S.C. §§ 952(a) and 963, to reach exclusively extra-territorial conduct.)

[7] Appellant next attacks the verdict on the ground that the evidence was insufficient to establish that he intended to import marijuana into the United States. In considering appellant's sufficiency of the evidence arguments we must view the evidence in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942). The test for sufficiency of the evidence is whether reasonable minds could conclude that the evidence is inconsistent with any reasonable hypothesis of the accused's innocence. *United States v. Henderson*, 588 F.2d. 157 (5th Cir. 1979).

At trial only one witness addressed the issue of whether DeWeese intended to import the marijuana aboard the "Cowboy" into the United States. Commander Howard Gehring, who was qualified as an expert in navigation and oceanography, concluded that the "Cowboy" was "en route to a United States port." Record, Vol. IV, at B-142. Gehring's opinion was based

on the assumption that a prudent mariner would take advantage of ocean currents, weather, bottom topography, and tides. *Id.*, at 111. The "Cowboy" had maintained two headings: 290 to 300 degrees, or northwest, and 340 degrees, or north-northwest. Gehring found that a vessel maintaining such headings in the Straits of Yucatan was positioned to take advantage of currents which would carry it north to the United States. The "Cowboy's" headings would not have favored a destination of Mexico, Cuba, or the Bahamas. *Id.*, at 130.

Gehring also analyzed the navigational charts discovered aboard the "Cowboy." He concluded that only charts for Mobile Bay, Alabama and the west coast of Florida, primarily Tampa Bay and Tarpon Springs, provided sufficient detail for a safe entry into port. It was noted that the only tidal tables on board the "Cowboy" were for Tarpon Springs. Gehring stated that the absence of detailed charts for Mexico, Cuba, the Bahamas, or anywhere outside of Mobile and west coast of Florida, would have prevented the "Cowboy" from safely entering foreign ports.

Based on Commander Gehring's testimony we find that a reasonable jury could have concluded beyond a reasonable doubt that the "Cowboy's" destination was an American port.

[8] We also note that the evidence is sufficient to find that DeWeese was engaged in a conspiracy to import. *United States v. Alfrey*, 620 F.2d 551 (5th Cir. 1980). In *Alfrey*, we concluded that the probable length of the voyage, the large quantity of marijuana on board, and the necessarily close relationship between the captain

and his crew were factors from which the jury could reasonably find guilt beyond a reasonable doubt. *Id.*, at 556. See *United States v. Christian*, 505 F.2d 94, 96 (5th Cir. 1974). The comparable facts in the present case are no less compelling. We find particularly persuasive the government's argument that it is illogical to believe that one person would attempt to smuggle eight million dollars of marijuana from Colombia to the United States without pre-arranged assistance.

IV. *Defendant's Discovery*

[9] Appellant contends that two defects in the discovery process require reversal. On August 14, 1979, the day before trial, the government provided defense counsel with a chart prepared by Commander Gehring. The chart was a "visual display of Commander Gehring's explanation of his expert opinion." Appellee's Brief, at 27. Among other things, the chart depicted the ocean currents in the Gulf of Mexico. "With minor modifications," the chart became Exhibit 27 and was used by Commander Gehring when he testified.

Appellant argues that this chart was a "report" within the meaning of Fed.R.Crim.P. 16(a)(1)(D). A month prior to trial on July 13, 1979 the defendant had requested all reports and examinations prepared by government experts. Appellant asserts that the government's failure to provide the report earlier constitutes a "flagrant" violation of his discovery request. He further urges that prejudice resulted because it was impossible to become familiar with the chart overnight without a background in oceanography.

The government responds that Commander Gehring's chart cannot properly be considered the report of a physical or mental examination or of a scientific test or experiment. Fed.R.Crim.P. 16(a)(1)(D). Our disposition of the issue does not require us to reach the government's contention. In the Fifth Circuit a failure to comply with Rule 16(a) is not reversible in the absence of a showing of prejudice. *United States v. Pascual*, 606 F.2d 561, 565 (5th Cir. 1979); *United States v. Arcentales*, 532 F.2d 1046, 1050 (5th Cir. 1976). The record in this case reveals no such prejudice. A broad assertion that DeWeese's counsel lacked adequate time for study of the chart does not constitute prejudice sufficient to require reversal.

[10] Appellant next argues that the government violated the court's omnibus order. Under this order both parties were to exchange witness lists by July 20, 1979. On the day before trial, August 14, 1979, the government informed the appellant that Commander Gehring would be testifying. As a result, appellant complains that he was unable to properly prepare for the cross-examination of Commander Gehring. Appellant urges that there was no excuse for his not being informed about this crucial witness as the government "obviously knew of Commander Gehring's existence long before the day of trial." Appellant's Brief, at 37.

We can find no excuse for the government's failing to inform the appellant in a timely fashion that Caption Gehring would testify. Certainly his testimony is a crucial part of the government's case. We agree that it is inconceivable that the government learned of the Commander one day before trial.

To warrant reversal, however, the appellant must make a showing of prejudice. *United States v. Phillips*, 585 F.2d 745, 747 (5th Cir. 1978). He has failed to do so. Thus, although we strongly condemn the failure of the government to abide by its obligations under the omnibus proceeding, we cannot reverse appellant's conviction absent a showing of prejudice.

Finally, appellant argues that the "Cowboy" was depicted prejudicially on Commander Gehring's chart. We find this argument to be frivolous.

V. *Conclusion*

In conclusion, we hold that the case was proved and the conviction is

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

CASE NO. 79-5575

JAY HILERY DeWEESE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING

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PETITION FOR REHEARING

JAY HILERY DeWEESE, by his undersigned attorney, files this Petition for Rehearing. This Petition is directed to the opinion filed in this court on December 17, 1980.

The scope of the Petition will be limited to matters which Petitioner respectfully submits were overlooked, not considered by the court or raise direct conflict with existing law in this circuit.

I

The opinion of December 17, 1980 creates authority for the conclusion that the captain of a vessel has no expectation of privacy in the closed hold of a vessel. Having so held, the court concluded that it was unnecessary to decide the reasonableness of the search.

The court overlooked and failed to consider the fact that its opinion is in direct conflict with the en banc opinion in *United States v. Williams*, 617 F.2d 1063 (5th Cir. 1980).

In *Williams, supra*, the court held that no mere crewmember could have a privacy interest in the hold of a cargo vessel. But, the court also recognized, in *Williams, supra*, the difference between private areas of the "holds" of a vessel and those similar areas open and exposed to public view, if the vessel were boarded. The *Williams* court recognized the fact that a closed hold might be invaded to check the vessel's main beam

identification number. It recognized the necessity for some minimum reason for searching.

In the case at bar, this court specifically held that the hold of the vessel, though covered, does not carry with it an expectation of privacy even to the captain of the vessel. Thus, no minimum basis for searching the closed hold is necessary.

A specific result of the conflict in the opinions is that the opinion of December 17, 1980 finds it unnecessary to reach the question of the reasonableness of the search while the *Williams* court does find such determination necessary.

II

The court overlooked and failed to consider the fact that the opinion of December 17, 1980 creates a new presumption in the law. The opinion follows the Government's argument that it is illogical to believe that one person would attempt to smuggle $8,000,000 of marijuana from Colombia to the United States without prearranged assistance. The opinion thus permits a presumption of the existence of a conspiracy when large quantities of marijuana are involved. Until the filing of the opinion on December 17, 1980, the only legally permissible presumption flowing from an arrest involving large amounts of marijuana was the presumption of the intention of distribution.

This court overlooked and failed to consider that it now adds the presumption of the existence of a

conspiracy where large amounts of marijuana are involved. Moreover, the opinion which Petitioner seeks to have reconsidered holds that the conspiracy presumed to flow from the amount involved is a conspiracy to import from Colombia into the United States.

A double presumption therefore is created; 1) the presumption that a conspiracy existed because of the magnitude of the material involved, and 2) that the conspiracy presumed to exist is one of importation. The burden is thus shifted to a defendant notwithstanding consitutional prohibition against such requirement to disprove the absence of a conspiracy.

III

The opinion recognizes the fact that the case is essentially a one-witness case; i.e., Commander Gehring. No other witness testified concerning the intended destination of the "Cowboy". The opinion states in part:

> " . . . We agree that it is inconceivable that the Government learned of the Commander one day before trial."

Actually, Commander Gehring was in the case from the initial sighting of the "Cowboy". The damaging nature of his testimony was not as a witness to the facts relating to the original boarding of the vessel, but in his appearance as an expert to give an opinion as to destination.

Indeed, other than the existence of the marijuana, the only important prejudicial testimony was that of Commander Gehring. The court overlooked and failed to consider the fact that it was impossible to prepare to refute his testimony when no proper notice was given.

Without his testimony, the only charge was that of possession with intent to distribute. That charge was stricken by the trial judge at trial since it did not include intent to distribute in the United States.

The only evidence of that phase of the case, the heart of the crime, was testified to only by Commander Gehring.

Surely the inability to prepare for that testimony was prejudicial.

IV

The court overlooked and failed to consider the fact that the "consent" of the captain to the search was not in reality a consent. This court has never held that 14 U.S.C. §89(a) is unconstitutional.

In this case, the Coast Guard boarded to search for any violation of the law. The captain was certainly not the one to determine that §89(a) is unconstitutional and that he, therefore, had the right to deny access to the Coast Guard. The Coast Guard certainly never advised him that he had such right. The only information they gave him on boarding was that they were there to look for any violation of the law. It is respectfully suggested, therefore, that no true consent was given.

CONCLUSION

It is urged that reconsideration of the opinion of December 17, 1980 is warranted.

Respectfully submitted,

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By: /s/ MILTON E. GRUSMARK
MILTON E. GRUSMARK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Rehearing has been furnished by United States Mail to the Office of the United States Attorney, Attn: Stephen S. Cowen, Esquire, Post Office Box 2841, Tampa, Florida 33601; on this 15th day of January, 1981.

Law Offices of
MILTON E. GRUSMARK, P. A.
Attorneys for Appellant

By: /s/ MILTON E. GRUSMARK
MILTON E. GRUSMARK

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO. 79-5575

JAY HILERY DeWEESE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellees.

SUGGESTION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Case No. 79-5575

JAY HILERY DeWEESE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

The undersigned, counsel of record, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

Jay Hilery DeWeese
Jack Wayne Freeman
Moses Taylor Millis
Keith Allen Keesling
Clifford Wayne Bennett

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the United States Court of Appeals for the Fifth Circuit:

United States v. Williams,
617 F.2d 1063 (5th Cir. 1980), (en banc);

United States v. D'Antignac,
628 F.2d 428 (5th Cir. 1980);

and the opinion of the Supreme Court of the United States in:

Jackson v. Virginia, et al.,
443 U.S. 307, 99 S.Ct. 2781 (1979).

With the realization that I am not required to state both reasons suggested under Rule 16, I also express a belief, based on a reasoned and studied professional judgment, that this appeal involves a question of exceptional importance, that is;

MAY A PRESUMPTION OF (a) CONSPIRACY, AND (b) CONSPIRACY TO IMPORT, EACH BE PERMITTED UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BASED SOLELY UPON THE FACT THAT A LARGE AMOUNT OF MARIJUANA IS DISCOVERED IN A VESSEL ON THE HIGH SEAS.

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I

MAY A PRESUMPTION OF (a) CONSPIRACY, AND (b) CONSPIRACY TO IMPORT, EACH BE PERMITTED UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BASED SOLELY UPON THE FACT THAT A LARGE AMOUNT OF MARIJUANA IS DISCOVERED IN A VESSEL ON THE HIGH SEAS 33

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IS THE DECISION IN THIS CASE WHICH HOLDS THAT A CAPTAIN OF A VESSEL HAS NO EXPECTATION OF PRIVACY IN THE HOLD OF A VESSEL IN CONFLICT WITH THIS COURT'S DECISION IN *UNITED STATES v. WILLIAMS*, 617 F.2d 1063 (5th Cir. 1980), SO AS TO REQUIRE A REHEARING EN BANC PURSUANT TO RULE 35 OF FEDERAL RULES OF APPELLATE PROCEDURE 35

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United States v. Williams,
617 F.2d 1063 (5th Cir. 1980) .....

STATEMENT OF ISSUES

The following issues are asserted to merit en banc consideration.

ISSUE I

MAY A PRESUMPTION OF (a) CONSPIRACY, AND (b) CONSPIRACY TO IMPORT, EACH BE PERMITTED UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BASED SOLELY UPON THE FACT THAT A LARGE AMOUNT OF MARIJUANA IS DISCOVERED IN A VESSEL ON THE HIGH SEAS.

ISSUE II

IS THE DECISION IN THIS CASE WHICH HOLDS THAT A CAPTAIN OF A VESSEL HAS NO EXPECTATION OF PRIVACY IN THE HOLD OF A VESSEL IN CONFLICT WITH THIS COURT'S DECISION IN *UNITED STATES v. WILLIAMS*, 617 F.2d 1063 (5th Cir. 1980), SO AS TO REQUIRE A REHEARING EN BANC PURSUANT TO RULE 35 OF FEDERAL RULES OF APPELLATE PROCEDURE.

STATEMENT OF THE COURSE OF PROCEEDINGS

This case was determined in the trial court by a jury verdict of guilty followed by a judgment of conviction and sentenced by the trial judge.

Appeal to the United States Court of Appeals for the Fifth Circuit resulted in an opinion filed on December 17, 1980.

Petition for Rehearing has been filed this date.

STATEMENT OF THE FACTS

A vessel known as the "Cowboy" was boarded by a Coast Guard crew approximately 250 miles from the United States.

At the time the "Cowboy" was boarded, there were five (5) crewmen on board including Appellant, the captain. The Coast Guard had boarded the "Cowboy" to check for violations of the law. Checks were made, by the boarding party, for safety equipment, documentation and comparison of the numbers on the documentation papers with the numbers on the vessel.

The numbers were found on a steel beam in the engine room about five feet above the floor. All documentation papers were in order and the safety equipment was proper. A slight problem existed which did not affect safety.

Despite the fact that the boat was properly documented and contained the necessary safety equipment, the Coast Guard decided to search the concealed "hold" of the boat. This search was conducted despite the fact that there was no safety equipment in the hold and that all documentation papers had previously been checked.

When the captain was asked if the hold might be searched, he said, "sure, but you won't like what you will find".

Upon searching the hold of the boat, the Coast Guard discovered a large quantity of marijuana. Appellant and the crew members were immediately placed under arrest. The men were handcuffed and the "Cowboy" was towed into Tampa City Docks.

It is respectfully submitted that no other facts are appropriate in relation to this Suggestion for Rehearing En Banc.

ARGUMENT AND AUTHORITIES

I

MAY A PRESUMPTION OF (a) CONSPIRACY, AND (b) CONSPIRACY TO IMPORT, EACH BE PERMITTED UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BASED SOLELY UPON THE FACT THAT A LARGE AMOUNT OF MARIJUANA IS DISCOVERED IN A VESSEL ON THE HIGH SEAS.

The panel opinion for the first time permits a double presumption to flow solely from the presence in an arrest of large amounts of marijuana. The law presently is that a presumption of intention to distribute exists where large amounts are involved. A trial judge only has the right under the present law (prior to the panel opinion) to instruct a jury that the existence of large amounts may lead to the presumption of intention to distribute.

The panel, in the opinion sought to be reviewed, states:

> "... We find particularly persuasive the government's argument that it is illogical to believe that one person would attempt to smuggle eight million dollars of marijuana from Colombia to the United States without pre-arranged assistance."

If this be the law, a trial judge would have the power to instruct a jury: (a) that the large amount

involved can lead to the conclusion that an agreement existed; and (b) it may lead to the conclusion that an agreement existed to import from Colombia to the United States.

Jackson v. Virginia, et al., 443 U.S. 307, 99 S.Ct. 2781 (1979), clearly holds that every element of a crime charged must be proven. The holding of the panel is in conflict with the holding in *Jackson, supra*, and cases cited therein.

If the panel opinion stands, the Government would be relieved of the responsibility of proving each element necessary for conviction. If, for example, multiple defendants are involved, the holding of the panel in this case would lead to the conclusion that the presumption of prearranged agreement and assistance existed between the multiple defendants solely based upon the large amount of money or weight of marijuana in the case.

The basic protection of presumption of innocence was not considered but overlooked in the opinion filed by the panel in this case.

II

IS THE DECISION IN THIS CASE WHICH HOLDS THAT A CAPTAIN OF A VESSEL HAS NO EXPECTATION OF PRIVACY IN THE HOLD OF A VESSEL IN CONFLICT WITH THIS COURT'S DECISION IN *UNITED STATES v. WILLIAMS*, 617 F.2d 1063 (5th Cir. 1980), SO AS TO REQUIRE A REHEARING EN BANC PURSUANT TO RULE 35 OF FEDERAL RULES OF APPELLATE PROCEDURE.

The panel in this case ruled that the captain of a vessel does not have a reasonable expectation of privacy in the hold of a vessel and, therefore, it is not necessary to determine whether the search of a vessel was reasonable under the Fourth Amendment of the United States Constitution.

The panel in this case overlooked and failed to consider the fact that its opinion was in direct conflict with the en banc opinion in *United States v. Williams*, 617 F.2d 1063 (5th Cir. 1980). In *United States v. Williams*, *supra*, the court held that mere crew-members of a vessel have no expectation of privacy and, therefore, could not object to any illegal search. The court recognized, however, that under the guidelines of *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), the owner of a vessel may have a privacy interest in the hold of a vessel. A careful reading of *Rakas v. Illinois*, *supra*, indicates that not only does an owner have an expectation of privacy in a vehicle but a person who has a possessory interest also has an expectation of

privacy in. It is clear that a captain of a vessel who is in charge of the safety of the vessel and all of the merchandise on the vessel has a sufficient possessory interest in that vessel to warrant a reasonable expectation of privacy in a closed area of the vessel.

In *United States v. Williams, supra*, the court ruled that before a search of the hold of a vessel can be made, there must be some minimum reason for searching it. By ruling that the captain had no reasonable expectation of privacy in the hold of a vessel, this panel's decision is in direct conflict with *Williams, supra*, which indicates that an individual with a possessory interest does have an expectation of privacy. By ruling that the captain had no expectation of privacy in the vessel, the panel failed to follow the ruling in *Williams, supra*, which requires that there be some reasonableness before a search is conducted.

United States v. D'Antignac, 628 F.2d 428 (5th Cir. 1980), reiterates the law of *Williams, supra*.

The panel opinion clearly states that no expectation of privacy exists in a hold of a vessel. *Williams, supra*, however, equally clearly recognizes the "private" areas of the hold.

Since this case is in direct conflict with the holding in *United States v. Williams, supra*, this court should grant a rehearing to accomplish uniformity in these decisions.

CONCLUSION

It is respectfully submitted that for the reason stated in this Suggestion, rehearing en banc is appropriate.

It is further suggested that for the reasons stated in this Suggestion, reversal of the conviction is appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Suggestion for Rehearing En Banc has been furnished by United States Mail to the Office of the United States Attorney, Attn: Stephen S. Cowen, Esquire, Post Office Box 2841, Tampa, Florida 33601; on this 15th day of January, 1981.

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By: /s/ Milton E. Grusmark
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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-5575

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAY HILERY DeWEESE,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion December 17, 1980, 5 Cir., 198_, ____ F.2d ____).

(March 11, 1981)

Before RONEY, HILL and FAY, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible] HILL
United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

THE UNITED STATES CONSTITUTION

AMENDMENT [IV.]

Searches and seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

THE UNITED STATES CONSTITUTION

AMENDMENT [V.]

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offece to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

THE UNITED STATES CONSTITUTION

AMENDMENT [VI.]

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

TITLE 14, UNITED STATES CODE §89(a)

§89. Law enforcement

(a) The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears

that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.

TITLE 21, UNITED STATES CODE §846

§846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

TITLE 21, UNITED STATES CODE §952

§952. Importation of controlled substances — Controlled substances in schedules I or II and narcotic drugs in schedules III, IV, or V; exceptions

(a) It shall be unlawful to import into the customs territory of the United States from any place outside

thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that –

(1) such amounts of crude opium and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV, or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States –

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate, or

(B) in any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 823 of this title,

may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.

Nonnarcotic controlled substances in schedules III, IV or V

(b) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any nonnarcotic controlled substance in schedule III, IV or V, unless such nonnarcotic controlled substance —

(1) is imported for medical, scientific, or other legitimate uses, and

(2) is imported pursuant to such notification or declaration requirements as the Attorney General may by regulation prescribe.

Coca leaves

(c) In addition to the amount of coca leaves authorized to be imported into the United States under subsection (a) of this section, the Attorney General may permit the importation of additional amounts of coca leaves. All cocaine and ecgonine (and all salts, derivatives, and preparations from which cocaine or ecgonine may be synthesized or made) contained in such additional amounts of coca leaves imported under this subsection shall be destroyed under the supervision of an authorized representative of the Attorney General.

Office-Supreme Court, U.S.
FILED
JUL 15 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1893

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAY HILERY DEWEESE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Acting Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JANIS H. KOCKRITZ
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Department of Justice
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QUESTIONS PRESENTED

1. Whether the boarding of an American flag vessel on the high seas and the search of its ice hold by Coast Guard officers violated the Fourth Amendment.

2. Whether the district court properly permitted the testimony of a government witness whose name was not timely furnished under the court's discovery order.

3. Whether the evidence was sufficient to show that petitioner was engaged in a conspiracy to import marijuana into the United States.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1893

JAY HILERY DEWEESE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 2-17) is reported at 632 F. 2d 1267.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1980. A petition for rehearing was denied on March 11, 1981 (Pet. App. 39-40). The petition for a writ of certiorari was filed on May 9, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of conspiracy to import marijuana into the United States, in violation of 21 U.S.C. 963. He was sentenced to five years'

imprisonment to be followed by a seven-year term of special parole.[1] The court of appeals affirmed (Pet. App. 2-17).

The evidence at trial is summarized in the opinion below (Pet. App. 7-8). It showed that on May 14, 1979, the Coast Guard Cutter POINT LOBOS, on patrol near the Straits of Yucatan[2] some 250 miles from the United States, sighted a large shrimp boat with the name COWBOY and the home port of "Mobile" painted on its stern (A Tr. 67, 75-80, 94-95). After closing to a distance of 25 yards from the COWBOY the POINT LOBOS requested over its loudspeaker that the COWBOY stop for a boarding (A Tr. 82).

The COWBOY stopped its engines and three Coast Guard officers boarded the boat. Petitioner identified himself as the captain. Petty Officer Helms explained that he was checking the COWBOY for compliance with United States laws (A Tr. 82; B Tr. 12-13). In response to Helms' request, petitioner produced documentation papers identifying the COWBOY as an American flag ship but could produce no permits allowing the vessel to shrimp in foreign waters (B Tr. 30-31). An inspection of the vessel revealed one minor safety violation and the absence of the required oil pollution placard (B Tr. 15-16).

During the inspection the officers in the boarding party noticed that none of the COWBOY's nets was in the water, and that the rigging for the nets was clean and did not appear to have ever been used (A Tr. 79; B Tr. 54, 62). In

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[1]We note that petitioner received a special parole term as part of his sentence for conspiracy to import marijuana. In *Bifulco* v. *United States*, 447 U.S. 381 (1980), however, this Court held that a special parole term may not be imposed for a narcotics conspiracy offense. Petitioner's remedy is to move the district court for correction of sentence pursuant to Fed. R. Crim. P. 35.

[2]The Straits of Yucatan is the body of water separating the western tip of Cuba and the eastern tip of Mexico, connecting the Caribbean Sea and the Gulf of Mexico.

addition, the metal strips on the boards used for dragging the nets on the ocean floor were in a rusty condition, indicating that they had not been used recently (B Tr. 54-57).

After inspecting the COWBOY's engine room, Officer Helms asked petitioner if he could take a look at the vessel's ice hold, where the catch is generally stored. Petitioner responded, "Sure, but you're not going to like what you find" (B Tr. 17). As petitioner and a crew member lifted the hatch to the ice hold, the Coast Guard officers on the deck observed a large number of marijuana bales in the hold; they then placed petitioner and his crew under arrest (B Tr. 20-23). A subsequent search of the vessel uncovered a total of more than 20 tons of marijuana, with a retail value of approximately $8 million (B Tr. 64, 84-85).

ARGUMENT

1. Petitioner argues (Pet. 4-17) that the high seas boarding of his vessel and the subsequent search of its hold violated his Fourth Amendment rights. First, he contends that 14 U.S.C. 89(a), which authorizes the Coast Guard to board United States flag vessels on the high seas and to conduct safety and document inspections, is unconstitutional on its face. Second, he contends that the stop and boarding in this case were unlawful in the absence of reasonable suspicion that the vessel was operated in violation of United States laws. Third, petitioner argues that even if the Coast Guard officers properly boarded his boat, the search of the hold was unlawful because it was conducted without either probable cause or voluntary consent. These contentions are without merit and do not warrant this Court's review.

a. There is no occasion for this Court to consider the facial constitutionality of 14 U.S.C. 89(a). To begin with, every court that has considered the matter has upheld the constitutionality of the statute. See *United States* v. *Arra*,

630 F. 2d 836, 840-842 (1st Cir. 1980); *United States* v. *Hilton*, 619 F. 2d 127, 131-133 (1st Cir. 1980), cert. denied, No. 79-1732 (Oct. 6, 1980); *United States* v. *Williams*, 617 F. 2d 1063, 1079-1082, 1085-1086 (5th Cir. 1980) (en banc); *United States* v. *Erwin*, 602 F. 2d 1183, 1184 (5th Cir. 1979), cert. denied, 444 U.S. 1071 (1980); *United States* v. *Warren*, 578 F. 2d 1058, 1064 (5th Cir. 1978) (en banc), cert. denied, 446 U.S. 956 (1980). Moreover, as this Court observed in *Sibron* v. *New York*, 392 U.S. 40, 59 (1968), the constitutional validity of a warrantless search or seizure "is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case." Hence, we turn to consider whether the actual boarding and search in this case were reasonable under the Fourth Amendment.

b. As to the boarding, the courts of appeals have uniformly upheld the validity of suspicionless boardings of American vessels on the high seas by Coast Guard officers acting under the authority of Section 89(a) in circumstances similar to those here, and this Court has consistently declined to review these decisions. See, *e.g.*, *United States* v. *Hilton*, *supra*; *United States* v. *Harper*, 617 F. 2d 35, 37-39 (4th Cir. 1980), cert. denied, No. 79-1863 (Oct. 6, 1980); *United States* v. *Warren*, *supra*.[3] There is no greater reason to grant review here.

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[3]Contrary to petitioner's suggestion (Pet. 12-14), the decision in this case does not conflict with *United States* v. *Piner*, 608 F. 2d 358 (9th Cir. 1979). In *Piner*, the court held that the Fourth Amendment was violated by the warrantless and suspicionless boarding of a pleasure vessel by Coast Guard personnel for a safety and documentation inspection, but only because in that case the boarding took place after dark. The court assumed arguendo that "the governmental interest in securing compliance with safety regulations outweighs the intrusion on privacy encountered in the ordinary boarding" (*id.* at 361), but held that the governmental interest could be sufficiently protected by random

Petitioner contends (Pet. 12) that the boarding of his vessel is closely analogous to the investigatory stops of automobiles and individuals in street encounters, and, like such intrusions, must be justified by reasonable suspicion. See, *e.g.*, *United States* v. *Cortez*, No. 79-404 (Jan. 21, 1981); *Michigan* v. *Summers*, No. 79-1794 (June 22, 1981), slip op. 4-9. But in light of the important governmental interests in enforcing the numerous laws peculiar to vessels on the high seas, the practical difficulties involved in law enforcement at sea, and the reduced expectations of privacy of those on board American flag vessels because of the pervasive nature and long history of maritime regulation, the courts of appeals have correctly held that the limited intrusion upon privacy interests occasioned by boardings conducted under the authority of 14 U.S.C. 89(a) is not unreasonable within the meaning of the Fourth Amendment.

c. Petitioner's challenge to the search of the vessel's ice hold must also fail, because, as the court below held (Pet. App. 12 n.1), petitioner freely consented to the search. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973). The record shows that in response to Officer Helms' question whether he could look inside the ice hold, petitioner said "[s]ure" (B Tr. 17). There is nothing in the record to support petitioner's assertion (Pet. 16-17) that the Coast Guard officers coerced petitioner to consent through a show of

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daytime boardings and did not justify the increased "subjective intrusion" of suspicionless boardings of vessels after dark. Since the boarding in this case took place during daylight hours, and since this was a commercial fishing boat and not a pleasure vessel, there is no conflict with *Piner*.

force or through a claim of authority to search without consent.[4]

2. Petitioner next argues (Pet. 18-22) that the government's failure to disclose the name of an expert witness several weeks prior to trial, as required by a pretrial discovery order, deprived him of effective assistance of counsel and his right to cross-examine that witness. The court of appeals correctly held (Pet. App. 16-17), however, that petitioner had failed to demonstrate prejudice and that therefore any error in admitting the witness's testimony was harmless. In any event, this harmless error issue is not of such general importance as to warrant this Court's review.

Prior to trial, on July 2, 1979, the district court entered an omnibus discovery order which required both parties to exchange, by July 20, 1979, lists of potential witnesses; the order did not require the disclosure of the substance of the witnesses' testimony.[5] On July 19 and again on July 31, the

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[4]In addition, the court of appeals properly concluded (Pet. App. 9-12) that petitioner did not make a sufficient showing that his legitimate expectations of privacy were violated by the search of the hold. See *Rawlings* v. *Kentucky*, 448 U.S. 98, 104-106 (1980); *Rakas* v. *Illinois*, 429 U.S. 128 (1978). We agree with the view of nine judges of the Fifth Circuit that, "[b]ecause maritime activities are pervasively regulated, and because a number of the regulatory laws permit government officials to enter the holds of vessels * * * there is no legitimate privacy interest in any part of a vessel's hold." *United States* v. *Williams*, *supra*, 617 F. 2d at 1087 n.25. See, *e.g.*, *United States* v. *Willis*, 639 F. 2d 1335, 1337 (5th Cir. 1981); *United States* v. *Raub*, 637 F. 2d 1205 (9th Cir. 1980), cert. denied, No. 80-5096 (Oct. 20, 1980). Petitioner notes (Pet. 11) the "possibilit[y]" that a shrimp boat's captain might lock the hatches leading to the hold and retain sole possession of the key. Even assuming that this factor might make a difference to the Fourth Amendment analysis, petitioner does not and could not suggest that it is present here.

[5]We note our view that federal district courts have no inherent power to order the parties to a criminal case to identify their witnesses in advance of trial. Such power must derive from a statute or rule. While

government submitted witness lists, but it omitted the name of a potential expert witness on navigation, Coast Guard Commander Gehring. One day before trial, the government notified petitioner that Commander Gehring would testify and supplied petitioner with charts the witness would utilize during his testimony (see A Tr. 18-19).

Commander Gehring testified two days later as an expert in navigation and oceanography. In his testimony, he concluded, based on his knowledge of ocean currents, weather, bottom topography and tides, that the COWBOY was en route to a United States port at the time of the Coast Guard boarding (B Tr. 142). The COWBOY's headings indicated that it was positioned to take advantage of currents that would take it north to the United States, not to alternative destinations such as Mexico, Cuba or the Bahamas (B Tr. 130). Gehring also stated that the absence of detailed charts for any port outside of Mobile Bay, Alabama and the West Coast of Florida would have prevented the COWBOY from safely entering foreign ports. Defense counsel cross-examined Gehring at length on the scientific bases for his opinion.[6]

In these circumstances, petitioner has failed to make the required showing of prejudice to warrant reversal. See *United States* v. *Phillips*, 585 F. 2d 745, 747 (5th Cir. 1978). Petitioner knew that the indictment charged him with conspiring to import drugs into the United States, and he was therefore aware that the government would have to prove,

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the 1974 revisions to the Federal Rules of Criminal Procedure contained a proposal to empower district courts to require reciprocal pretrial disclosure of witness lists, Congress struck this provision from Rule 16 as enacted. See H.R. Conf. Rep. No. 94-414, 94th Cong., 1st Sess. 12 (1975). But see *United States* v. *Cannone*, 528 F. 2d 296 (2d Cir. 1975).

[6]The cross-examination of Commander Gehring covers 52 pages of the trial transcript.

through expert testimony or otherwise, that his planned destination was a port within the United States. Petitioner could not have been prejudiced simply because he did not know the name of the particular witness who would testify on this obvious and essential point. And even if the government had furnished Gehring's name to petitioner by the required date, petitioner would have had no indication of the substance of Gehring's testimony and, hence, would have had no additional reason to study wind and ocean currents, weather conditions, and other factors relevant to proving the COWBOY's probable destination. Petitioner was informed of Gehring's status as an expert and was furnished with a copy of the witness's nautical chart two days before Gehring's testimony. In sum, it could not have come as a surprise to petitioner that there would be destination testimony, he had two days to focus specifically upon Gehring's forthcoming testimony, and he would have had no more notice of Gehring's expertise even if the government had complied with the discovery order. Accordingly, there is no reason to believe that petitioner's cross-examination of Gehring would have been any more thorough or effective than the one that was actually presented.

3. Petitioner finally contends (Pet. 23-25) that the government presented insufficient evidence to show that he conspired to import marijuana into the United States. The court of appeals correctly rejected this fact-bound claim (Pet. App. 13-15).

The evidence demonstrated that petitioner and four other crew members had set sail from Mobile, Alabama in March 1979, two months prior to the May 14 Coast Guard boarding. Despite its two months at sea, the COWBOY's shrimping nets and equipment appeared to be unused. In addition, the crew could produce no permits allowing them to fish in

foreign waters. A search of the hold uncovered 503 bales of marijuana. The jury could properly have concluded that the "length of the voyage, the large quantity of marijuana on board, and the necessarily close relationship between the captain and his crew" (Pet. App. 14-15), coupled with the evidence that the crew had not been fishing, established that petitioner conspired with other persons to import the marijuana. See *United States* v. *Alfrey*, 612 F. 2d 180, 185-186 (5th Cir. 1980), cert. denied, No. 80-5158 (Oct. 20, 1980) (two man crew had necessarily close relationship with captain on a small vessel); *United States* v. *Laughman*, 618 F. 2d 1067, 1074-1075 (4th Cir. 1980) (presence of two tons of marijuana in small boat could hardly have escaped attention of crew members); *United States* v. *Gomez*, 529 F. 2d 412, 418-419 (5th Cir. 1976) (the large quantity of marijuana involved—460 pounds—would require the assistance of others to unload).

Moreover, Commander Gehring's testimony was sufficient to show that the COWBOY's destination was an American port. As the court of appeals correctly held (Pet. App. 14), a reasonable jury could have concluded, based on Gehring's description of the boat's course and the prevailing currents it was utilizing, that the COWBOY was headed for the United States. At the time of its initial sighting, the COWBOY was headed in a northerly direction and was sailing near the axis of the fastest available current that would carry it north. The vessel's only detailed navigational charts, which were necessary to facilitate safe entry into port, were for a small island near the Columbian-Nicaraguan coast, for Mobile Bay, Alabama, and for Tampa Bay and Tarpon Springs, Florida. The absence of detailed charts for Mexico, Cuba or the Bahamas would have prevented the COWBOY from safely entering those foreign ports. This circumstantial evidence sufficiently demonstrated that the COWBOY was en route to American waters.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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